United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original Affidavit attached

76-6188

To be argued by
KENT T. STAUFFER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6188

B

P/S

UNITED STATES OF AMERICA and ROBERT RAGONE, Special Agent, Internal Revenue Service,

Petitioners-Appellees,

—v.—

MANUFACTURERS & TRADERS BANK (formerly First Empire Bank—New York) and JAMES A. KYPRIOS, Vice President, International Banking, Manufacturers & Traders Bank,

Respondents,

ALLAN H. APPLESTEIN,

Proposed Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONERS-APPELLEES

ROBERT B. FISKE,
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Attorney for Petitioners-Appellees.

KENT T. STAUFFER,
PAUL H. SILVERMAN,
Assistant United States Attorneys,
Of Counsel.

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BRIEF FOR PETITIONERS-APPELLEES

Issue Presented on Appeal

Did the District Court abuse its discretion in denying Applestein's application for intervention in a proceeding brought by the Internal Revenue Service to enforce an administrative summons for records of a third party relating to Applestein?

Statement of the Case

Proposed intervenor-appellant, Allan H. Applestein (hereinafter "Applestein" or the "Taxpayer"), appeals from an opinion and order of the Honorable Charles M. Metzner, United States District Judge, Southern District of New York, filed November 23, 1976. Judge Metzner's opinion and order denied the application of Applestein to intervene in the proceedings below and granted the petition of petitioners-appellees United States of America and Robert Ragone, Special Agent, Internal Revenue Service (hereinafter collectively, the "IRS"), to enforce an Internal Revenue Service summons issued to respondents Manufacturers & Traders Bank and James A. Kyprios, an officer thereof (hereinafter collectively, the "Bank").

The IRS initiated this summons enforcement proceeding by order to show cause, dated October 5, 1976, in respect of an IRS summons served on the bank on February 10, 1976, pursuant to section 7602 of the Internal Revenue Code, 26 U.S.C. § 7602. Prior to the return date of the order to show cause sought by the IRS, counsel on behalf of Applestein obtained a counter order to show cause, seeking to intervene in the IRS summons enforcement proceeding and to enjoin the IRS from enforcing its summons against the Bank. In addition, Applestein sought "full and unfettered discovery to ascertain the true nature and purpose of the . . . summons." (33a).* In support thereof, counsel for Applestein asserted, by counsel's affidavit, that the summons was issued in bad faith and for an improper purpose, namely "to obtain evidence solely for use in criminal proceedings against Applestein." (28a).

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* References in the form "....a" are to the correspondingly designated pages of the "Appendix for Appellant."

Following a court hearing on both orders to show cause, on October 20, 1976, the IRS and Applestein submitted further affidavits.

Thereafter, the District Court, in the opinion and order appealed from, denied Applestein's application, citing *Donaldson* v. *United States*, 400 U.S. 517 (1971), and *United States* v. *A. L. Burbank & Co.*, 525 F.2d 9, 17 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3719 (June 14, 1976), and granted the IRS' petition to enforce the summons. The Court specifically found that there had been no recommendation for criminal prosecution, that the summons was issued in aid of "an investigation that is likely to lead to civil liability as well as criminal prosecution," and that "[t]he affidavits are insufficient to support allegations that the summons was issued in bad faith." (70a).

The Bank has taken no appeal from the summons enforcement decision and order of the District Court. Accordingly, the only issue presently before this Court is the propriety of the denial of Applestein's application to intervene.

Statement of Facts

The essential facts underlying this action involve the nature of the pending Internal Revenue Service joint investigation of Applestein and the actions taken by the Special Agent in serving the summons at issue.

The Joint Investigation

The summons at issue was served on the Bank in aid of an active joint civil-criminal investigation of Applestein and of companies and entities in which Applestein has an interest, being conducted by the IRS Audit and

Intelligence Divisions. Commenced in September, 1974, as a civil audit, by Revenue Agent Milton Billig of the Audit Division, located in Miami, Florida (65a), the investigation was expanded in May, 1975, into a joint investigation, encompassing both civil audit of Applestein's affairs and inquiry into possible criminal violations of the tax laws by Applestein (*Id.*), and Revenue Agent Billig was joined by Special Agent Richard Jaffe of the Intelligence Division (57a, 65a), who was thereafter succeeded in the joint investigation by Special Agent Robert Grant. (21a).

Upon joining the joint investigation, Special Agent Jaffe routinely sent notices to Applestein that he, Jaffe, had been assigned to determine if any criminal violations of the tax laws had been committed with respect to Applestein's personal income tax returns and those of a foundation in which Applestein has an interest (21a-22a, 41a, 42a). This routine notification was given irrespective of the fact that Jaffe was a part of a joint investigation (22a). On November 25, 1975, the District Director of Internal Revenue, Jacksonville, Florida, requested the Audit Division to take no civil assessment action or enforcement action in the cases subject to the joint investigation until the Intelligence Division had completed its investigation and made a recommendation concerning prosecution. This request was repeated by a memorandum dated August 25, 1976 (23a).

At the same time, the Audit Division, and Revenue Agent Billig in particular, continued to be a part of and cooperate in the continuing joint investigation (23a-24a, 65a-66a). The focus of the joint investigation is and has been the federal tax liabilities of Applestein and of the companies and entities in which he has an interest, and, regardless of the outcome of the criminal portion of the joint investigation, the information gathered by the Special Agent in charge of the joint investigation will

be used by the Audit Division for the determination of Applestein's correct tax liability (21a, 24a).

To date, Special Agent Grant has made no final determination of his own nor has he made any recommendation to the District Director of the Internal Revenue Service, as to whether or not to institute criminal proceedings; and clearly no such recommendation has been made to the Department of Justice (23a). Indeed, Special Agent Grant, in his affidavit, stated: "I do not expect to be able to make a final recommendation concerning criminal prosecution, one way or the other, for many months, pending receipt of information pursuant to a number of requests for information which are still outstanding." (24a).

The Summons Issued to the Bank

On or about January 9, 1976, Special Agent Jaffe, of Miami, requested the IRS District Director in New York to cause a summons to be issued to the Bank, in New York (22a), because the files and records of the investigation indicated that Applestein and companies and entities in which he has an interest have conducted financial transactions with the Bank and, therefore, Bank records may be relevant to a determination of the federal tax liability of Applestein (22a-23a).

On February 10, 1976, Special Agent Robert Ragone of the Internal Revenue Service in New York, issued and personally served such a summons on the Bank (15a, 18a-19a).* The summons directed the Bank to appear

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* Note that the correct date of service of the summons is February 10, 1976, not February 25, 1976, as stated in the Brief for Appellant, at 4.

before Special Agent Ragone to give testimony and to produce books, records, and papers relating to transactions of Applestein and of specified companies and entities in which he has an interest, for the tax years 1971 through and including 1974 (18a-19a).

Thereupon, the Bank initiated a series of informal requests for extensions of time to respond to the summons. Special Agent Ragone acceded to these requests, finally setting the Bank's time for compliance with the summons at 10 o'clock a.m. on March 29, 1976 (16a).

On March 17, 1976, Ragone received a telephone call from a man who identified himself as Phil Weinstein and stated that he was an attorney for Applestein. Weinstein asked Ragone why there was a summons issued to a New York bank in this case and why there was a current investigation pending concerning his client. Ragone stated in reply that he did not know any of the details of the pending investigation concerning Applestein and that he would not comment on it, except to say that the summons was issued at the request of Internal Revenue agents in Florida. Weinstein then asked Ragone what his title and functions were generally. Ragone stated that he was a Special Agent of the Internal Revenue Service, attached to the Intelligence Division in New York City, and that his duties involved the investigation of criminal violations, such as tax evasion, false statements, and failure to file tax returns. At that point the conversation ended (60a-61a, 62a).

On March 29, 1976, the Bank's requested summons return date, the Bank failed to appear at the time set, and thereafter refused to appear, citing a restraining order entered at the behest of Applestein in an action entitled *Allan H. Applestein* v. *M & T Bank, a/k/a Manufacturers & Traders Bank*, 76 Civ. 1443 (CMM) (S.D. N.Y.) (16a).

Thereafter, the IRS, which was not a party to that separate action, commenced the present summons enforcement proceeding.

ARGUMENT

The District Court decision to deny intervention should be affirmed because the District Court did not abuse its discretion.

POINT I

Intervention by a non-summoned taxpayer is a matter of District Court discretion.

The decision whether or not to permit Applestein to intervene is a matter committed to the sound discretion of the District Court. *Donaldson* v. *United States*, 400 U.S. 517, 530 (1971) ("[T]he District Court, upon the customary showing, *may* allow the taxpayer to intervene.") (emphasis added). *See Couch* v. *United States*, 409 U.S. 322, 326-7 (1973); *United States* v. *A. L. Burbank & Co.*, 525 F.2d 9, 17 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3719 (June 14, 1976); *Application of Cole*, 342 F.2d 5, 8 (2d Cir.), *cert. denied*, 381 U.S. 950 (1965). An order denying permissive intervention may be appealed only if the court has abused its discretion. *Brotherhood of R.R. Trainmen* v. *Baltimore & O.R.R.*, 331 U.S. 519, 524-5 (1947); *United States* v. *Interstate Tool and Engineering Corp.*, 526 F.2d 59, 62 (7th Cir. 1975); *Weiser* v. *White*, 505 F.2d 912, 916 (5th Cir.), *cert. denied*, 421 U.S. 993 (1975). *Cf. SEC* v. *Everest Management Corp.*, 475 F.2d 1236, 1240 (2d Cir. 1972) ("We are fortified in our reluctance to reverse such a discretionary order by the reliable information that there is not a single reported case in

which an appellate court has reversed solely because of an abuse of discretion in denying permissive intervention. 7A Wright and Miller, Federal Practice and Procedure, § 1923, at 631-32 (1972).").

Applestein challenges the findings of fact of the District Court that "[t]he summons here is part of an investigation that is likely to lead to civil liability as well as criminal prosecution," and "[t]he affidavits are insufficient to support allegations that the summons was issued in bad faith." (30a).*

To upset these findings, Appellant Applestein must demonstrate that they are clearly erroneous. Rule 52(a), Fed. R. Civ. P.; *United States* v. *Fisher*, 500 F.2d 683, 687-8 (3d Cir. 1974), *aff'd*, 425 U.S. 391 (1976) (Findings that IRS summons issued in good faith, prior to recommendation for criminal prosecution, and pursuant to investigation of possible tax liability not clearly erroneous.)

POINT II

The summons was issued for a legitimate purpose.

Applestein's claim that his intervention in this proceeding is "virtually mandatory" (Appellant Br., at 14) is squarely foreclosed by the facts underlying the holding of the Supreme Court in the landmark case in this area of the law. *Donaldson* v. *United States*, *supra*. In *Donaldson*, an Internal Revenue Service summons was issued to a third party in aid of an investigation being

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* Applestein apparently does not challenge the finding that there has been no recommendation for criminal prosecution. Appellant Br., at 6.

conducted by Special Agents of the Intelligence Division. The summons was served on a third party and sought records related to the taxpayer, but not owned or possessed by the taxpayer. After the taxpayer obtained an order enjoining the summoned party from complying with the summons, the IRS filed a petition for its enforcement. Then the taxpayer sought to intervene in the IRS summons enforcement proceeding, alleging as follows:

> Petitioner[s] . . . are guilty of bad faith both with the court and the intervenor in asserting that they have been conducting an investigation to ascertain the correct income tax liability of [the taxpayer] . . . .
>
> * * * * *
>
> The function of the Intelligence Division is to enforce the criminal statutes applicable to tax laws by developing information concerning alleged criminal violations thereof.
>
> Special Agent Bruce B. Miller was assigned the investigation of [taxpayer] . . . for the express and sole purpose of obtaining evidence concerning any violations of the criminal statutes applicable to the tax laws of the United States and special agent John P. Grady is assisting special agent Miller in this investigation. [*United States* v. *Mercurio*, 418 F.2d 1213, 1215-16 (5th Cir. 1969), *aff'd sub nom. Donaldson* v. *United States*, 400 U.S. 517 (1971).]

The court, on those facts, denied the taxpayer's application to intervene. That holding, affirmed by the Fifth Circuit, was upheld by the Supreme Court, which specifically stated:

> We therefore hold that the taxpayer's interest is not enough and is not of sufficient magnitude

> for us to conclude that he is to be allowed to intervene. Were we to hold otherwise, as he would have us do, we would unwarrantedly cast doubt upon and stultify the Service's every investigatory move. [400 U.S. at 531.]

Thus, in *Donaldson*, intervention was denied despite allegations in the pleadings that the investigation was being conducted solely by agents of the Intelligence Division, seeking information relevant to possible criminal violations. In the present case, the information gathered is also being applied by a Revenue Agent of the Audit Division to determine the appropriateness and extent of available civil tax remedies. *A fortiori*, Applestein's claim to be entitled to intervention is even less compelling than was that of the taxpayer in *Donaldson*.

The use by the Internal Revenue Service of joint civil-criminal investigations into taxpayers' affairs has been clearly recognized by the Supreme Court. In *Donaldson*, after reviewing IRS procedures for instituting and conducting joint investigations "directed to both civil and criminal infractions," the Court stated, "The fact that a full-scale tax fraud investigation is being made does not necessarily mean that prosecution ensues when tax liability becomes apparent." *Donaldson* v. *United States, supra*, 400 U.S. at 535 (footnote omitted).

Nevertheless, Applestein urges that there is no valid pending civil aspect of the joint investigation, relying on the following facts: (i) the IRS notices sent to Applestein stated that an investigation had been commenced to determine if any criminal violations of the tax laws had been committed (21a-22a, 41a, 42a); (ii) the District Director requested that the Audit Division take no civil assessment or enforcement action with respect to Applestein pending the determination whether or not to prose-

cute (23a); and (iii) Revenue Agent Billig had no contact with Applestein's accountant after April, 1975 (55a, 65a-66a).* With respect to the notices to Applestein, the mere fact that a criminal investigation is pending obviously does not negate the fact that a civil audit investigation is also pending.

The request of the District Director to the Audit Division was not a direction that the Audit Division withdraw from the joint investigation nor was it a termination of the civil aspects of the joint investigation, as Applestein would have this Court believe (Appellant Br., at 12). It simply suspended the making of assessments, *see* 26 U.S.C. § 6201, and collection activities which follow assessments, *see* 26 U.S.C. §§ 6303, 6321, and 6331. An assessment is nothing more than the end product of a process which includes the revenue agent's audit. Accordingly, a direction which suspended only the formal, final step in this process in no way interfered with Revenue Agent Billig's authority to continue with his audit work, as the affidavits of agents Grant and Billig indicate (23a-24a, 65a-67a).

Similarly (Applestein's accountant has stated that, since he had no contact with Revenue Agent Billig since April, 1975, "it was [his] *impression* that Mr. Billig had completed the investigative phase of the examination on April 7, 1975)." (56a; emphasis added). Such an opinion,

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* Applestein apparently recedes from the contention made in the court below that the IRS conducted and closed a civil audit of Applestein in about September, 1974 (29a, 32a). Not only was this contention flatly contradicted by other evidence submitted by Applestein (55a), but it was also rebutted by the statements of Revenue Agent Billig that he did not even commence the audit of Applestein until September, 1974, and that the audit has never been closed and is still continuing (65a-67a).

without any real or apparent basis in fact, cannot be credited, nor can it support Applestein's claim for "further inquiry" (13a). Billig has clearly stated that he has neither closed the civil audit nor completed his investigation, and that statement was underscored by Special Agent Grant.

On this evidence, the District Court's finding that the summons was issued in aid of "an investigation that is likely to lead to civil liability as well as criminal prosecution" (70a) is fully supported by the record and clearly not erroneous. *See Couch* v. *United States*, *supra*, 409 U.S. at 324 (Summons enforced where issued pursuant to a joint investigation "to determine [taxpayer's] correct tax liability, the possibility of income tax fraud and the imposition of tax fraud penalties, and, lastly, the possibility of a recommendation of a criminal tax violation.").

It should be noted that, even if the District Court had found that the Audit Division was no longer participating in the investigation, the summons would still be enforceable, and Applestein would still not be entitled to intervene. Indeed, *Donaldson* was just such a case; the investigation there was being conducted by the Intelligence Division, which "enforces the criminal statutes affecting income and certain other taxes and develops information concerning alleged criminal violations," *Donaldson* v. *United States*, *supra*, 400 U.S. at 534. The Supreme Court in reviewing the statutory history of 26 U.S.C. § 7602, found that it "appears to authorize the use of the summons for investigation into criminal conduct. There is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance." 400 U.S. at 535. *See also United States* v. *Powell*, 379 U.S. 48, 53 (1964) ("If a taxpayer has filed fraudulent returns, a tax liability exists . . . . Section 7602 authorizes

the Commissioner to investigate any such liability.") (footnote omitted); *United States* v. *Friedman*, 532 F.2d 928, 932-3 (3rd Cir. 1976); *United States* v. *Turner*, 480 F.2d 272 (7th Cir. 1973); *United States* v. *Wall Corp.*, 475 F.2d 893, 895 (D.C. Cir. 1972). *Accord*, *United States* v. *Billingsley*, 469 F.2d 1208, 1209-10 (10th Cir. 1972), where the court stated, "While a criminal investigation remains solely within the Internal Revenue Service, the civil aspects are inextricably associated with the criminal."

Withal, Applestein asserts that, on the basis of assertions that are inherently not credible and legally irrelevant, he should be permitted "further inquiry" "to determine the true purpose of the summons. . . ." (Appellant Br., at 13). *Cf.*, *United States* v. *Church of Scientology*, 520 F.2d 818, 824 (9th Cir. 1975) ("The party resisting enforcement should be required to do more than *allege* an improper purpose before discovery is granted. . . . Conclusory allegations carefully tailored to the language of *Powell* . . . are easily made.") (emphasis original).

Applestein cites in support of his claim the opinions in *United States* v. *McCarthy*, 514 F.2d 368 (3rd Cir. 1975); *United States* v. *Wright Motor Co.*, 536 F.2d 1090 (5th Cir. 1976); and *United States* v. *Roundtree*, 420 F.2d 845 (5th Cir. 1969). However, Applestein conveniently ignores the crucial distinction that, in each of those cases, the party granted discovery rights was the one to whom the summons had been issued. Here, the summons at issue was directed to a third-party bank, not to the Taxpayer. *See Donaldson* v. *United States*, *supra; United States* v. *A. L. Burbank & Co.*, *supra.*

POINT III

The summons was issued in good faith.

Applestein asserts that, while there may have been no recommendation for criminal prosecution, the summons should not have been enforced and intervention should have been permitted because the summons was issued in bad faith. Applestein thus seeks a determination by this Court that the finding of the District Court that "[t]he affidavits are insufficient to support allegations that the summons was issued in bad faith" is clearly erroneous. *United States* v. *Fisher, supra.*

The "good faith" requirement is derived from the opinion in *United States* v. *Powell, supra,* where a taxpayer sought to challenge an IRS summons issued to him pursuant to 26 U.S.C. § 7602. The taxpayer alleged his returns for the years subject to the summons had previously been examined and that, since the statute of limitations barred assessment of additional deficiencies for the subject years except in cases of fraud, a more complete statement concerning the nature of the investigation was required of the IRS before the summons could be enforced.

The IRS agent conducting the investigation in *Powell,* in his affidavit in support of the petition to enforce the summons, essentially admitted the allegations of the taxpayer, stating "that the agent had reason to suspect that the taxpayer had fraudulently falsified it . . . returns by overstating expenses." 379 U.S. at 50.

The trial court held that these statements were a sufficient basis for the enforcement of the summons, and the Supreme Court agreed:

> [A]n abuse would take place if the summons had been issued for an improper purpose, such as

> to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the court's process is on the taxpaper. . . . [379 U.S. at 58 (footnote omitted).]

The "good faith" requirement was further emphasized by the Supreme Court in *Donaldson* v. *United States, supra*, where it said, "We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." 400 U.S. at 536.

Applestein seeks to buttress his contention that the summons was issued in bad faith by citing to the holdings in *United States* v. *Wall Corp., supra; United States* v. *McCarthy, supra;* and *United States* v. *Lafko*, 520 F.2d 622 (3rd Cir. 1975). In *Wall Corp.*, the taxpayer attempted to establish a "firm purpose to recommend criminal prosecution" by the mere fact that only a special agent was working on the investigation and that his duties involved the conduct of criminal investigations. The court found such testimony insufficient to support a finding of bad faith or to demonstrate that the agent had a firm purpose to recommend criminal prosecution. *United States* v. *Wall Corp., supra*, 475 F.2d at 895.

In *United States* v. *McCarthy, supra*, the summons was issued not to a third party but to the taxpayer himself, who challenged it on several grounds, only one of which is relevant to the situation in this case: that there was no civil purpose to the investigation since it was conducted by special agents of the Intelligence Division and since the taxpayer's tax liability had previously been determined and deficiency assessed. As to the claim that there existed no valid civil purpose, the court in *McCarthy*

stated that those allegations were not of themselves sufficient to raise the issue of criminal purpose. However, relying on the fact that the taxpayer claimed that the agents had told his counsel that they were conducting a criminal investigation, the court granted a hearing on this limited issue. *United States* v. *McCarthy*, 514 F.2d at 374-5.

In the present case, Applestein, who was not served with the summons, makes no claim that there has been a previous determination of civil tax liability. Rather, to try to bring himself within the exception of *McCarthy*, Applestein's counsel alleges that Special Agent Ragone stated that the investigation was "strictly criminal." However, the evidence clearly shows that Ragone in New York was not directly involved in the Florida investigation and had no detailed knowledge of it and that, merely in response to a specific question from Applestein's attorney, he had characterized his general duties as relating to alleged criminal conduct. In addition, agents Grant and Billig each stated that the investigation was being conducted as a joint investigation by the Audit and Intelligence Divisions and that enforcement of the summons is sought "because the documents and testimony sought may be relevant to a determination of the federal tax liability of Applestein and the companies and entities in which he has an interest." (23a).

Applestein also relies on *United States* v. *Lafko*, *supra*. However, in *Lafko*, it was uncontroverted that three months prior to the issuance of the summons, "Intelligence Division agents formally recommended that [the taxpayer] be prosecuted. . . ." *United States* v. *Lafko*, *supra*, 520 F.2d at 623-4. This recommendation had been forwarded to the IRS Regional Counsel's office for evaluation. The trial court held that since the Justice Department had made no recommendation to prosecute, the summons was enforceable.

The Third Circuit reversed because the District Court had applied the wrong test as to the proper point in the administrative process to look for a "recommendation for criminal prosecution," referred to in *Donaldson* as the cut-off point of enforceability. *Donaldson* v. *United States*, *supra*, 400 U.S. at 536. The Court did *not* hold the summons unenforceable, and it specifically refused to take a position on when a "recommendation" actually occurs, *United States* v. *Lafko*, *supra*, 520 F.2d at 625 n.6; it simply remanded the case for a development of the record.

While the general principles set forth in the cases cited by Applestein comport with the *Powell* requirement, the IRS submits that the facts of this case are more nearly analogous to those present in the recent case of *United States* v. *Friedman*, *supra*, in which there was also no prior recommendation for criminal prosecution and no allegations of harassment:

> To hold on the basis of this record that the district court erred in enforcing the summonses we would have to disregard the teaching of *Donaldson United States*, *supra*, *United States* v. *McCarthy*, *supra*, and *United States* v. *Lafko*, *supra*, and create a *per se* rule that the issuance of a § 7602 summons by a Special Agent having power to recommend prosecution is always improper. Under the authorities we cannot do so. [*Id.*, 532 F.2d at 932-933.]

The evidence in the record of this case clearly demonstrates that the investigation is being conducted, and the summons was issued, for the purpose of determining the correct tax liability of Applestein. Since Applestein has not met his burden of proof on the issue of good faith, the findings of the District Court on this issue should be affirmed.

CONCLUSION

For the reasons discussed herein, the order of the District Court denying Applestein's application to intervene in the proceedings below should be affirmed in all respects.

Dated: New York, New York
January 21, 1977

Respectfully submitted,

ROBERT B. FISKE, JR.,
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KENT T. STAUFFER,
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Assistant United States Attorneys, Of Counsel.

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Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

CA 76-6188

State of New York)
County of New York) ss

Kent T. Stauffer being duly sworn, deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 21st day of January, 1977 he served two copies of the within Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

Ballon, Stoll & Itzler
1180 Avenue of the Americas
New York, New York 10036

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Kent T. Stauffer

Sworn to before me this

21st day of January, 1977

Pauline L. Troia

PAULINE F. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978